NATIONAL LABOR RELATIONS BOARD
BEFORE JUDGE DAVID GOLMAN

CAYUGA MEDICAL CENTER
AT ITHACA, INC.,

Respondent

- and -

1199 SEIU, UNITED HEALTHCARE
WORKERS EAST,

Charging Party

Case Nos. 03-CA-156375
03-CA-159354
03-CA-162848
03-CA-165167
03-CA-167194

RESPONDENT'S POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

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I. PRELIMINARY STATEMENT

This post-hearing brief is respectfully submitted on behalf of Cayuga Medical Center ("CMC") in the above-captioned case. This case involves several issues but none of these issues are particularly complicated. The key facts are mostly undisputed.

The Amended Complaint contends that CMC committed a laundry list of alleged garden-variety violations of Section 8(a)(1) in connection with the campaign by 1199 SEIU, United Healthcare Workers East ("Union") to organize CMC nurses. The evidence in the record establishes that the General Counsel either failed to carry its burden of proof or that the actual facts do not support the finding of any violations. Instead, the overwhelming evidence reveals that pro-union employees have been freely permitted to solicit their co-workers throughout CMC's facility for the now more than one-year-long duration of the Union's organizing campaign; that no one has ever been counseled or disciplined for pro-union solicitation/distribution; and that although CMC has exercised its free-speech rights under Section 8(c) to express its view that maintaining direct working relationships between management and staff is preferable to unionization, CMC has consistently recognized and explicitly acknowledged that the choice belongs to the staff nurses and that this is their right under federal law.

The Amended Complaint also contends that CMC violated Section 8(a)(3) in connection with certain disciplinary actions taken against two known union supporters. However, the contemporaneous documentation and overwhelming credible evidence establishes that each such action represented an entirely legitimate response to employee misconduct; that CMC's actions were supported by consistent past practice pre-dating any union activity; and that the record is devoid of any evidence of a discriminatory or retaliatory motive, nor of any anti-union animus from which such a

motive could reasonably be inferred. On the contrary, the record evidence establishes that in each instance the discipline was triggered by one or more clear acts of misconduct, and that if anything CMC bent over backwards and exercised restraint to avoid the implication or appearance that union support had any bearing on the matter.

Therefore, for the reasons discussed in more detail below, we respectfully request that the Amended Complaint be dismissed in its entirety.

II. BACKGROUND INFORMATION

CMC has been serving the people of Ithaca, New York, Tompkins County, and the surrounding communities for over 125 years. (Transcript, page 786) (hereafter "Tr. __"). It has grown to become a large complex organization with over 1350 employees who are dedicated to providing quality care. Notwithstanding the unfounded assertions of Counsel for the General Counsel in her opening statement that CMC has inadequate staffing and burned out nurses resulting in unsafe conditions, the truth is that CMC is the only hospital in the entire Central New York Region stretching from the Pennsylvania to Canadian borders, west to Geneva and Corning, and east to Albany and Cooperstown, that received a Hospital Safety Score of "A" by a reputable national survey, while most of the other regional hospitals received "Cs" and "Ds". (See Respondent's Exhibit 5 (hereafter "R-Ex. __"); Tr 786-88). As in every 24/7 healthcare facility across New York State and across the nation, however, staffing is a constant challenge because patient census and patient acuity are always fluctuating. Like all healthcare facilities, CMC staffs to a median and flexes up or down based on patient needs at any given point. (Tr. 790-91).

The Union's campaign to organize approximately 350 registered nurses began in early 2015, and has continued during all relevant times up to the present.[1] The alleged unfair labor practices purportedly occurred between January and November 2015.[2] Contrary to Counsel for the General Counsel's claim in her opening that CMC has responded to union organizing activity among its nurses by "[doing] everything in its power to try to halt the campaign in its tracks regardless of the law" (Tr. 22), the truth is that CMC has made every effort to respect the Section 7 rights of all employees, including those who favor unionization and those who do not. (Tr. 792-94). At the same time, CMC has exercised its free speech rights under Section 8(c) by informing the nurses of its belief that maintaining direct working relationships between all members of the organization is the best choice, and by providing the nurses with relevant information to help them make informed decisions. A constant theme in CMC's written communications to the nurses about the union campaign has been that, "As employees of CMC, you have the right to advocate in favor of a union; you also have the right to advocate against union representation (within the guidelines of our existing solicitation policy requiring that solicitations only occur between employees during non-work time). We respect these rights regardless of your viewpoint on this subject." (See General Counsel Exhibit 2c, hereafter "GC-Ex. __"; see also GC-Ex. 2j).

[1] To date no petition has been filed.

[2] All dates referred to herein were in 2015 unless otherwise noted. The Amended Complaint combines a series of unfair labor practice charges. To the extent that any of the alleged violations stem from events occurring outside the Section 10(b) period based on the date the applicable charge, then the matter should be dismissed as time barred.

III. ARGUMENT

A. THE SECTION 8(A)(1) ALLEGATIONS SHOULD BE DISMISSED BASED ON THE GENERAL COUNSEL'S FAILURE TO CARRY ITS BURDEN OF PROOF AND/OR BASED ON THE CREDIBLE EVIDENCE IN THE RECORD.

1. The Nursing Code of Conduct Is Not Unlawful

CMC maintains a Nursing Code of Conduct that prohibits disrespectful or intimidating behavior toward others, as well as criticism of co-workers or other staff in the presence of others in the workplace and/or patients. (GC-Ex. 3). It is undisputed that the Code of Conduct was established several years before any union organizing activity and in fact was written by an internal committee of staff nurses. (Tr. 774-75).

CMC submits that this type of professional code of conduct does not violate Section 8(a)(1) merely because it is written in broad terms. The notion that nurses should generally engage in professional, courteous and respectful interactions with others in the performance of their duties reflects longstanding and nationally recognized standards for the nursing profession, not to mention common sense and societal norms of civility. (Tr. 775-76; ee also GC-Ex. 3, p.1 under "Supporting Data") There is nothing in the Code of Conduct that prevents nurses from complaining about their terms and conditions of employment or otherwise engaging in protected concerted activity.

Furthermore, the Code of Conduct as written does not reference supervisors or managers at all. The entire thrust of the policy involves proper behavior of nurses in the performance of their duties and their treatment of fellow co-workers, customers/patients and others such as family/visitors. Such requirements regarding courteous, profess-sional and respectful behavior toward fellow employees and guests does not violate the NLRA. *See Copper River of Boiling Springs*, 360 NLRB No. 60, *64-68 (2014)

(distinguishing employment practices directed at behavior toward management as opposed to those directed at behavior toward co-workers and customers).

2. The May 7 & August 26 Emails Were Lawful Communications

The General Counsel contends that two emails from CMC's Director of Human Resources to CMC nurses violated Section 8(a)(1) because they contained the statements below.

> May 7 email:
>
> "If you feel you are being harassed or intimidated feel free to contact your supervisor, director or security."
>
> (GC-Ex. 2(a)).
>
> August 26 email:
>
> "If you feel that you continue to be harassed you have every right to file a complaint in our incident reporting system, and notify your Director so that we can address the behavior with the individual involved."
>
> (GC-Ex. 2(f)).

Mr. Pedersen provided uncontroverted testimony that a number of CMC employees reported that they felt they were being pressed to sign a union authorization card. (Tr. 798-99). The Board has held that employer communications relating to legitimate threats and harassment have been found not to violate the Act. *See e.g., Ithaca Industries,* 275 NLRB 1121, 1126 (1985) (it was lawful for an employer to tell employees that they should report coworkers who "intimidate" them while soliciting cards); *First Student, Inc.*, 341 NLRB 136 (2004) (employer's request to report incidents where employees were confronted and forced or intimidated into supporting the union was lawful).

More importantly, unlike the communications in *Ithaca Industries* and *First Student*, the above statements contained in Mr. Pedersen's emails are not specifically directed at harassment or intimidation by pro-union employees, but rather were broadly written to cover any harassment/intimidation by persons favoring the Union and/or by persons opposing the Union. Furthermore, the statements should be considered in context. In his June 25 email to nurses, Mr. Pedersen stated that, "[a]s employees of CMC, you have the right to advocate in favor of a union; you also have the right to advocate against union representation …. We respect these rights regardless of your viewpoint on this subject." (GC-Ex. 2(c)). This exact same message was repeated in Mr. Pedersen's July 15 email to nurses. (GC-Ex. 2(j)). Similarly, in his August 23 email to nurses, Mr. Pedersen stated that, "[a]s employees of CMC, you have the right to advocate in favor of a union; you also have the right to advocate against union representation…." (GC-Ex. 2(e)). Likewise, in his November 13 email to nurses, Mr. Pedersen stated that, "[w]hile those who are in favor of organizing have a right to communicate, those who are opposed to unionization have the same right." (GC-Ex. 2(i)). What is clear from the May 7 and August 26 emails is that the right to communicate/advocate does not include the right to harass or intimidate, without regard to the viewpoint being communicated or advocated.

Thus, the charges based on the May 7 and August 26 emails are unfounded and should be dismissed.

3. Employees Were Not Prevented From Tabling

Paragraph VII(a) of the Amended Complaint alleges that on or about July 8 CMC unlawfully interfered with tabling on behalf of the Union in the facility's cafeteria. This allegation is predicated on two instances when Vice President of Human Resources Alan Pedersen first observed this activity and stated to one employee on the first occasion and another employee on the second occasion that he did not believe their display was appropriate, which prompted the first employee to leave a few minutes before the end of her meal period, and to which the second employee responded that he was within his rights and therefore would not shut down. In neither instance was there any confiscation of materials or threat of discipline. Most importantly, upon further review of the issue, management adopted a hands-off approach and freely allowed the same employees and other pro-union employees to engage in tabling in the cafeteria on a frequent basis and multiple occasions over the ensuing days, weeks and months without any disciplinary or other adverse consequences

More specifically, Mr. Pedersen testified that upon first encountering employee Anne Marshall sitting at the entrance to the cafeteria with all of her union materials, he told her that she "really shouldn't be doing that here," after which she picked up her materials and left. (Tr. 60-61). A day or two later upon encountering employees Scott Marsland and Erin Bell inside the cafeteria with two tables pulled together and union literature spread across the two tables, Mr. Pedersen again told them that they shouldn't be doing that here. (Tr. 61) The cell phone video of the encounter and resulting transcript reveal that Mr. Pedersen actually said, "You're not allowed to set up a fixed presence in the cafeteria. You can, if you want to talk and solicit and have conversations with people, you can do that. You are not allowed to do this." Mr.

Marsland responded that the union had informed him he had a right to do this, to which Mr. Pedersen disagreed, and said, “So I’ll have security come and take this away then.” Mr. Pedersen reiterated that maintaining a fixed presence was inappropriate, to which Mr. Marsland responded that that was not his understanding of the law, and that maybe some clarification was needed. Mr. Pedersen simply responded, “Okay”, and that was the end of the interaction. (See GC-33a and 33b). Mr. Marsland and Ms. Bell did not leave or remove their materials (Tr. 519-521), nor did Mr. Pedersen call security or otherwise attempt to confiscate or remove any materials (Tr. 63), nor did Mr. Pedersen threaten any discipline or other adverse action (Tr. 64) (contrary to Counsel for the General Counsel’s characterization that Mr. Pedersen threatened Mr. Marsland (see Tr. 61). Mr. Marsland testified that he and Ms. Bell stayed and continued tabling for about an hour after their brief interaction with Mr. Pedersen. (Tr. 519).

Thereafter, Mr. Pedersen consulted with labor counsel and determined that CMC would take a hands-off approach to tabling in the cafeteria by Union proponents. (Tr. 63). It is undisputed that tabling continued on multiple occasions thereafter over a period of several months on a very frequent basis. (Tr. 63-64).

The General Counsel will likely argue that an employer’s failure to expressly repudiate it’s initial stance by telling the employees first spoken to that in fact continued tabling would be permitted renders the employer in violation of Section 8(a)(1). While it is undisputed that Mr. Pedersen did not personally speak with Marshall, Marsland or Bell following the determination to allow the tabling, by his email to all registered nurses dated July 15 Mr. Pedersen did in fact address the issue and make clear that such activity would be allowed, first referring to “an increase in visibility by those in favor of creating a union for nurses,” and then stating while CMC disagrees with their viewpoint,

“we have respected their right to make their opinion known” (i.e. by not questioning continued tabling in the ensuing days after the initial encounters). (GC-Ex. 2(j)).

It is crystal clear from the video and transcript that Mr. Marsland was not intimidated or discouraged from continuing to engage in tabling following his initial encounter with Mr. Pedersen, and although Ms. Marshall left after her encounter with Mr. Pedersen this occurred at or about the end of her meal period when she had to return to work anyway. Marsland and Marshall both testified that they were not discouraged from further tabling and that they both did this, along with other employees, on multiple occasions thereafter. (Tr. 519-521; 276-278, 280-285).

The Board has made clear that there must be more than one episode of discriminatory enforcement of a no solicitation/distribution rule in order for there to be a finding of disparate treatment and objectionable conduct. *See, e.g., Avondale Industries*, 329 NLRB 1064, 1231 (1999) ("single instance . . . does not prove disparate treatment"); *Albertsons, Inc.*, 289 NLRB 177, 178 fn. 5 (1988) (disparate application of rule not shown by isolated instances); *Kendall Co.*, 267 NLRB 963, 965 (1983) (disparate enforcement of policy not shown by isolated deviations). *Uniflite, Inc.,* 233 NLRB 1108, 1111 (1977).

Here, the General Counsel failed to establish that there was ever a similar kind of tabling in the cafeteria by other groups. Scott Marsland admitted he didn’t have a lot of breaks in cafeteria and only said there was one or two instances of tabling that he ever recalled seeing. (Tr. 500-501). Anne Marshall testified that tabling had occurred elsewhere in the facility, such as for scrub sales, but she was not aware of whether the groups doing the tabling were affiliated with the hospital. (Tr. 189). This is insufficient

evidence of prior tabling by outside groups to establish a violation based on disparate treatment.

Furthermore, CMC's Vice President for Human Resources for the past 28 years, Allen Pedersen, testified that the only tabling that has taken place at CMC has been by the Hospital Auxiliary for fundraising activities, by benefit providers such as Excellus Blue Cross, by vendors of scrubs in conjunction with the Medical Center's Foundation, and in support of the annual United Way campaign. (Tr. 799-801). Mr. Pedersen further testified that the only tabling inside the cafeteria has been by Excellus Blue Cross and by the Hospital Auxiliary, and that this only was permitted against the windows on one side of the cafeteria and about halfway down that the length of the cafeteria. In contrast, when he first encountered tabling on behalf of the organizing campaign Ms. Marshall had positioned herself right in the front entrance to the cafeteria such that everyone using the cafeteria had to go around or pass directly by her table, and that there was no precedent that any tabling had ever been permitted in that particular location. (Tr. 801-02).

Finally, because there was no discipline issued for the conduct of employees tabling on behalf of the organizing campaign, and such conduct was allowed to continue indefinitely throughout the campaign, to the extent CMC's initial response represents a violation, such violation was fully remedied and *de minimis* and does not require any corrective action. *Dieckbrader Express, Inc.*, 168 NLRB 867 (1967) (inconsequential violation insufficient to warrant violation of the Act).

4. <u>There Is No Policy Against Discussing Wages</u>

Paragraph VII(d) of the Amended Complaint alleges that during the Section 10(b) period, CMC's Vice President of Human Resources, Alan Pedersen, informed employees that it was inappropriate to discuss their wages with one another, and Counsel for the General Counsel contended in her opening that CMC effectively maintained an unlawful rule requiring employees to keep information about their wages confidential. However, the General Counsel failed to produce evidence supporting either the specific allegation set forth in the Amended Complaint or the existence of such a policy or rule.

Under examination by Counsel for the General Counsel pursuant to Rule 611(c) of the Federal Rules of Evidence, Mr. Pedersen testified that he had not told any employees to keep salary information confidential. (Tr. 47-48). In attempting to prove the existence of a policy or rule prohibiting the sharing of wage information, the General Counsel relies upon a 5-year old letter requesting nursing staff to refrain from discussing a particular salary adjustment with other non-nursing staff since the special salary adjustment on that occasion was limited to nursing staff only. (GC-Ex. 5 and 6). Aside from being 5 years old, this letter clearly did not request or prevent nurses from speaking to one another about their pay; nor did it state that sharing this information with non-nursing personnel was prohibited; nor did it suggest in any way that employees could be disciplined for sharing the information. Rather, it simply requested that nurses exercise discretion in talking about the special pay increase with other non-nursing employees to whom the special pay increase did not apply. (Tr. 49). Upon further examination as part of the Respondent's case, Mr. Pedersen testified that there is no policy or rule prohibiting employees from discussing their wages. (Tr. 803-04).

Thus, the General Counsel failed to carry its burden of proof with respect to this charge, and accordingly the charge should be dismissed.

5. The Credible Evidence Fails to Establish Any Interrogation or Threats

The only evidence introduced by the General Counsel in support of Paragraphs 8(a) & (b) of the Amended Complaint was testimony from one witness, Anne Marshall, about a single instance of alleged interrogation and threats. Her testimony was directly contradicted by testimony from Joel Brown. We respectfully submit that Ms. Marshall's testimony lacked credibility; whereas Mr. Brown gave credible testimony that is corroborated by other evidence in the record.

It is undisputed that in April in his capacity as Interim Director of the ICU, Mr. Brown conducted one-on-one meetings with all nurses in the ICU to present them with information regarding the Union's organizing campaign. On direct examination by Counsel for the General Counsel, Ms. Marshall testified that, "I sat down in [Brown's] office and he basically told me that he knew I was the ring leader and I was the one promoting all this union stuff, and if it didn't stop he was going to get HR involved." (Tr. 193).

Mr. Brown credibly testified that Ms. Marshall's accusations were simply not true. (Tr. 1002). Mr. Brown stated that he was given a list of talking points provided by HR and Senior Leadership and he handed out these talking points and asked if employees had any questions in each of these one-on-one meetings. (Tr. 1003-05). The talking points are set forth at GC Exs. 39-40, and Ex. 39 is the document that was handed to employees. These talking points guided Mr. Brown's conversations. (Tr. 1003-05, GC Exs. 39-40).

Mr. Brown specifically recalled going through the fact sheet with Ms. Marshall, and he testified that Ms. Marshall asked him if he had ever worked at a union facility, and that he answered her question by stating yes (Tr. 1005). Mr. Brown testified that he never used the word ringleader and he never said anything about going to HR. (Tr. 1006). In fact, Mr. Brown stated that he never took a position himself on the union issue at CMC since his assignment at CMC was temporary in nature, and he had no particular stake in whether or not the nurses at CMC decided to unionize. (Tr. 1006). Mr. Brown's testimony that he never interrogated or threatened employees and instead followed the talking points as dictated by HR and Senior Leadership was forthright and had all the hallmarks of a credible and genuine recounting of what actually occurred. (Tr. 1003-07).

Furthermore, Mr. Brown's testimony was corroborated by the other evidence in the record. Mr. Pedersen testified that he has no knowledge that any supervisor or manager ever interrogated or threatened any employees in connection with the Union's organizing campaign. (Tr. 799, 816). He also testified that CMC used outside labor counsel to educate its supervisors and mangers throughout the facility about the lawful rules of conduct for them during an organizing campaign, and has conducted similar internal educational forums multiple times in the course of a year, as well as in prior years. (Tr. 799). He also testified that CMC provided members of management with talking points as to what to say about the organizing campaign to insure that the information being provided was consistent. (Tr. 813; see, e.g. GC-Exs. 39 and 40).

Given this context, Ms. Marshall's uncorroborated assertion that the Director of the ICU ignored the training, ignored the talking points, and blatantly interrogated and/or threatened her concerning her Union activity and support lacks credibility. Her

testimony particularly lacks the ring of truth insofar as she contended that Mr. Brown threatened her with "get[ting] HR involved" unless she stopped acting as a "ringleader", given that HR was the source of all the leadership training about appropriate conduct for supervisors and managers during an organizing campaign, and that HR was the source of the talking points, as well as being the source of the email communications discussed above that explicitly acknowledged the rights of employees to support and to advocate for unionization.

Ms. Marshall obviously has a large stake in the outcome of this case; whereas Mr. Brown left CMC back in mid 2015 and has no continuing ties to the organization. It is also relevant on the issue of credibility that Ms. Marshall made unfounded accusations of sexual harassment against Mr. Brown as determined by the New York State Division ("NYSDR") after investigating her claims in that proceeding, and therefore has a history of distorting and/or falsifying information involving Mr. Brown to support her own personal agenda; whereas no such evidence exists against Mr. Brown. Mr. Marshall admitted that her two sexual harassment complaints were dismissed by the NYSDR based on a finding of no probable cause to believe that any such harassment actually took place. (Tr. 299-300).

Finally, and perhaps most telling, the General Counsel failed to produce another witness out of 350 registered nurses at CMC and 22 in the ICU, nor any other shred of evidence, that either Mr. Brown or any other manager or supervisor ever asked them about their union sympathies/activities or threatened them with any type of reprisal for supporting unionization at CMC, even though it is undisputed that on the day that Ms. Marshall alleges Mr. Brown threatened her in their one-on-one meeting, Mr. Brown also conducted one-on-one meetings with every other nurse on the ICU, and none of them

ever claimed that he said or did anything inappropriate.

6. No One Was Prohibited From Posting or Distributing Literature

The undisputed evidence establishes that CMC afforded pro-union employees every opportunity on a daily and constant basis over a year-long period to solicit one another during non-work time, to obtain signed union authorization cards from one another, to distribute and post pro-union literature throughout CMC's facility, and to engage in extensive tabling in the employer's cafeteria. (Tr. 798, 519-521; 276-278, 280-285; see also GC-Exs. 2(c), (e), (i) and (j)). Aside from the *de minimus* tabling issue discussed above, there is no allegation or evidence that any employees were ever prevented from posting or leaving such material in CMC's facility; nor were any employees told they could not engage in this activity; nor was anyone counseled or threatened with discipline, nor given any discipline, for such engaging in such activity. (Tr. 803-04).

CMC does not dispute that one or more supervisors occasionally took down some pro-union postings. Joel Brown testified that he removed postings from the ICU break room, but only on a couple of occasions after receiving complaints from other employees about the postings. (Tr. 1007). The occasional removal of such material does not constitute an unlawful interference with Section 7 rights, particularly where, as here, the employer has an established practice of regularly removing non-business related material that is posted or left in its facility. (Tr. 818).

7. The August 31 Request for Confidentiality Was Legitimate

Paragraph IX of the Amended Complaint alleges that during a disciplinary meeting on August 31 a manager stated that the contents of the meeting should be kept confidential, and Counsel for the General Counsel contended in her opening that CMC effectively maintained an unlawful rule prohibiting employees from talking about any disciplinary actions that they received.

Not only is it a stretch for the General Counsel to claim that CMC maintains a general prohibition against talking about discipline based solely on a verbal request by a manager on one single occasion, but the surreptitious audio recording and resulting transcript of the August 31 meeting, along with the context in which the request was made, clearly establish that when CMC's then Interim Director of Critical Care, Sandra Beasley, stated that "whatever is said in this room, please keep it confidential," she was speaking to the disinterested co-employee witness (Kim Paquin), whom the employee being disciplined (Anne Marshall) had requested to attend, rather than the recipient of the disciplinary action herself. (GC-Ex. 28a-b)(see p.3 of GC-Ex. 28b, lines 14-16).[3] Thus, the manager asked the other staff member (Paquin) to keep the contents of the meeting confidential to protect the privacy of the employee being disciplined (Marshall). (See testimony by Vice President of Human Resources, Alan Pedersen, Tr. 50)(see also testimony by Assistant Vice President for Patient Services, Linda Crumb, Tr. 931). This is a far cry from what is being alleged in the charge, and there is nothing unlawful about asking an employee who is only present as a witness to a disciplinary meeting not to broadcast the matter to others; nor is there any evidence that the verbal request to

[3] Ms. Paquin is referred to in the transcript only as "UNIDENTIFIED FEMALE SPEAKER".

"please keep [the meeting contents] confidential" represented a binding instruction, much less a formal policy directive.

Mr. Pedersen testified that while there is no policy or rule requiring confidentiality concerning disciplinary actions, CMC does try to preserve confidentiality for the sake of employees who are receiving discipline. He further explained that, if an employee elects to share some disciplinary action that was taken against them, they are free to do that, but management tries to protect their privacy by not sharing this type of information with others. (Tr. 806-07). The uncontroverted evidence further establishes that no employee of CMC has ever been prevented from discussing or complaining about their own discipline; nor has anyone ever been counseled or disciplined for doing so; nor has any employee ever been instructed not to talk about a disciplinary action that he/she received. (Tr. 807-08).

Thus, the General Counsel failed to carry its burden of proof with respect to this charge, and accordingly the charge should be dismissed.

8. <u>The November 10 Facebook Posting Did Not Violate the Act.</u>

The Complaint also alleges violations stemming from some postings on social media by one supervisor who angrily expressed her personal feelings because she felt she was being personally attacked and falsely accused of sacrificing her integrity by allegedly lying in a proceeding before the New York State Division of Human Rights ("NYSDHR"). The evidence in the record is somewhat confusing, but it appears that registered nurse Scott Marsland posted a comment on Facebook under the alias "Charlie Green", in which he attacked House Supervisor Florence ("Flo") Ogundele's integrity by stating that Anne Marshall was "standing up for what is right" in connection

with a claim of sexual harassment she filed against her supervisor, then Interim Director of Critical Care, Normal "Joel" Brown, by "facing down Flo Ogundele" along with other named management representatives and their counsel at an upcoming appearance before the NYSDHR. (GC-Ex. 7). Mr. Marsland acknowledged that he posted more about Ms. Ogundele on Facebook than appears in GC-Ex. 7, and Ms. Ogundele testified that there were more personal attacks in Marsland's postings than shown in the record, including a statement to the effect that she had sold her soul to the devil, which Ms. Ogundele who is a religious person found deeply offensive. (Tr. 727-28, 730-31).

Ms. Ogundele responded in anger by posting a message on Facebook stating that she does not compromise her integrity to lie for anyone; that she cannot be bullied or intimidated; and advising Marsland not to mess with her, and to tell his disciples the same. (GC-Ex. 8). In a subsequent related posting on Facebook, Ms. Ogundele stated that she took her first posting down after being instructed to do so by her boss (i.e. CMC Assistant Vice President for Patient Services Linda Crumb), then proceeded to express her distaste for all the "bullshit" going on at work. (GC-Ex. 9).[4]

Ironically, although Marsland (a/k/a Green) had claimed that Marshall was doing the right thing and Ogundele was doing the wrong thing in connection with the NYSDHR case, after its investigation the NYSDHR determined that Marshall's accusations of sexual harassment against her supervisor were unfounded and dismissed both of her complaints. (Tr. 299-300).

Ms. Ogundele believed that her comments were personal in nature and not conveyed in her capacity as a management representative of CMC, but in any event when the Medical Center learned about this, she was instructed to immediately take

[4] The General Counsel also introduced a third unrelated Facebook posting by Ms. Ogundele but was unable to establish when this posting occurred or in what context it occurred. (GC-Ex. 10).

down the offending comments and she received a disciplinary warning for her unsanctioned and inappropriate statements on social media. (Tr. 728-29, 734-35; R-Ex. 4).

To support the contention that the Facebook postings by Ms. Ogundele violated Section 8(a)(1), it must be inferred that: (1) Ms. Ogundele's anger was directed at Mr. Marsland's Union support, even though her postings never mention the Union and she was clearly addressing his defamatory statements toward her; (2) that her vague comments were directed at all Union supporters, even though her comments again do not mention the Union; (3) that her admonitions about messing with her and picking the wrong girl suggested that she would invoke her authority in the workplace to respond, even though her words and tone were personal in nature and said nothing about acting in her capacity as a CMC Supervisor to impose potential discipline or other adverse employment actions; and (4) that any CMC employees who may have read her postings would have reasonably interpreted them as conveying threats of employment-related reprisals due to their Union support, even though the postings say nothing about this. We respectfully submit that such leaps cannot reasonably be inferred from Ms. Ogundele's words. Instead, the true nature of Ms. Ogundele's remarks seems quite obvious – she took great personal offense from what she perceived as an attack on her personal integrity, and she lashed back in response.

We therefore submit that a reasonable construction of this interaction on social media does not amount to a violation od Section 8(a)(1). Furthermore, while Ms. Ogundele's comments toward Mr. Marsland may reflect a sense of personal animus toward him as a result of his personal attack against her, this cannot be equated with

evidence of anti-union animus on the part of CMC.[5] Finally, at most Ms. Ogundele's postings on social media represent an isolated incident, and CMC took prompt and appropriate action upon learning of the postings by instructing her to take the postings down and issuing her a disciplinary warning. (Tr. 728-36; R-Ex. 4).

9. Nothing Unlawful Occurred in the November Safety Huddle

Florence Ogundele is employed as a house supervisor. (Tr. 68). Toward the end of November 2015, Ms. Ogundele held a safety huddle in the middle of her shift as was directed by Ms. Marshall. (Tr. 72-73). The safety huddle was called because of a discussion between a pro-union employee and another employee, where the employee started crying and stated that she would leave for the rest of the day because she felt so uncomfortable. (Tr. 536). At the meeting Ms. Ogundele stated "it doesn't matter if you're pro-union or not, there will be no bullying." (Tr. 534-39). Ms. Ogundele's statements focused on bullying and did not state an opinion one way or the other on the union issue, but was focused solely on the safety and well-being of the other employees.

Under these circumstances, this statement, which focused on bullying of other employees and was in direct response to an employee who was in tears, was not unlawful and did not violate the Act.

[5] We also note that Ms. Ogundele had no involvement in the verbal warning issued to Mr. Marsland by Amy Matthews more than a month prior to the Facebook postings, and she was not a decision-maker with respect to any of the matters involving Ms. Marshall, all of which also pre-dated the Facebook postings in issue.

B. THE CREDIBLE EVIDENCE ESTABLISHES THAT THE OCTOBER 5 VERBAL WARNING ISSUED TO SCOTT MARSLAND WAS BASED ON LEGITIMATE REASONS AND DID NOT VIOLATE SECTION 8(A)(3).

At all relevant times Scott Marsland was a registered nurse in CMC's Emergency Department ("ED"). It is undisputed that at all relevant times Mr. Marsland was openly supportive of unionization, and that CMC was aware of his pro-union viewpoint and his organizing activities.

The General Counsel alleges that Mr. Marsland was given a documented verbal warning for engaging in protected activity by complaining that he was not able to take breaks. However, the comments for which Mr. Marsland was disciplined involved individual attacks about the competence of his two co-workers in a public forum. Additionally, the two targets of his disparaging remarks were not present to defend themselves when he publicly made these statements at a staff meeting. (Tr. 506-08; GC Ex 34b; GC Ex. 32). These comments were made at a staff meeting on September 24, and there is no evidence in the record to suggest that any other employee joined in these individual concerns or supported the views that Mr. Marsland expressed in this meeting regarding the competency of his fellow nurses. (Tr. 558).

Specifically, at the September 24, 2015 meeting, which was a morning staff meeting led by Director of the Emergency Department, Amy Matthews, at which 11 team members were present, Mr. Marsland stated that he did not think that another nurse was "competent to care for [his] patients." (Tr. 565). Ms. Matthews instructed Mr. Marsland that this was not the proper forum for alleging that another team member was incompetent (and this was the first she had heard of the issue) and that Mr. Marsland should come to see her. Mr. Marsland persisted and was asked to stop at least three times; however, he persisted to disparage his colleague and damage her

reputation by insisting that she was not competent. (Tr. 565-66). He then proceeded to attack the skills of another nurse in this same meeting. (Tr. 567).

There was also evidence that Mr. Marsland and Ms. Amy Matthews (Director of the Emergency Department) had previously talked about the need to discuss issues such as these, involving public criticism of co-workers, outside of the open forum. (GC - Ex. 34b, p. 5). At the meeting were Mr. Marsland was given a verbal warning, Mr. Marsland acknowledged that he had made a mistake by condemning someone as he did out in front of everyone, and he stated that he agreed with Ms. Matthews (GC-Ex. 34b, p. 6). Additionally, one of the nurses who had been publicly disparaged by Mr. Marsland called Ms. Marshall in tears after hearing about his comments from others. (Tr. 568-69).

The evidence clearly establishes that Mr. Marsland was not given a verbal warning for any protected concerted activity; instead, he was disciplined for making demeaning and derogatory comments about his co-workers publicly in front of a number of other staff.

Ms. Matthews gave credible uncontroverted testimony: (1) that she maintains an open door policy, meaning that any staff member can talk to her if they have a concern about anything; (2) that staff members have come and talked to her about a variety of issues, including issues relating to staffing and scheduling, patient care scenarios, the Electronic Medical Record, the length of time it takes to get physician orders or to get a patient to the floor or mental health holds; (3) that she has never disciplined or counseled an employee for complaining to her about any such issues; (4) that such complaints have never changed her relationship with the complaining employee; (5) that she has never disciplined an employee for complaining about the inability to take

breaks; (6) that she never made any attempt to find out who filed a complaint with the New York State Department of Labor about employee breaks; (7) that instead she brought the issue to a staff meeting and said okay we have a problem and let's discuss ideas about how to solve the problem; (8) that her staff meeting in September 2015 was not the first time that a nurse had complained about an issue like scheduling, breaks or conditions on the unit; (9) that employees express complaints/concerns at every staff meeting; and (10) that she has never disciplined anybody for voicing a legitimate concern; but (11) that prior to Mr. Marsland "nobody has voiced a concern that has torn down another person in front of a group of people" and her verbal warning was based on his inappropriate conduct in publicly portraying a co-worker "in a very bad light. (Tr. 582-587).

The General Counsel had failed to carry its burden to prove that the verbal warning was issued for a retaliatory motive because of Mr. Marsland's Union support and/or because of any other protected concerted activity such as his complaints about not being able to take breaks.

C. THE CREDIBLE EVIDENCE ESTABLISHES THAT THE DISCIPLINARY ACTIONS, DEMOTION AND PERFORMANCE EVALUATION ISSUED TO ANNE MARSHALL WERE BASED ON LEGITIMATE REASONS AND DID NOT VIOLATE SECTION 8(A)(3).

At all relevant times Anne Marshall was a registered nurse in CMC's ICU. It is undisputed that at all relevant times Ms. Marshall was openly supportive of unionization, and that CMC was aware of her pro-union viewpoint and her organizing activities.

The Amended Complaint alleges that CMC discriminated against Ms. Marshall due to her Union support and acted with a retaliatory motive when it suspended her on June 26 due to an incident of misconduct; when it issued a documented verbal warning to her on July 10 due to another incident of misconduct; when it demoted her from her Charge Nurse position to a regular Staff Nurse position on August 31 due to further acts of misconduct and a failure to carry out her Charge Nurse responsibilities; and when it issued an unfavorable performance evaluation to her on October 30.

However, the clear and convincing evidence in the record establishes that each one of these actions was based on legitimate reasons; and that the actions were not motivated by a sense of retaliation; but rather were genuinely viewed as an appropriate and necessary response to her misconduct in the performance (or non-performance) of her duties as a Charge Nurse. At all times CMC was fully aware that any adverse actions against Ms. Marshall could be perceived as retaliatory due to her active role in the Union's organizing campaign, and therefore proceeded very cautiously, took a measured approach, and was very reluctant in taking corrective action. The overwhelming credible evidence establishes that the actions in issue were NOT taken against Ms. Marshall because of her protected activity, but rather were taken IN SPITE OF her protected activity because her behavior was so poor that it could not reasonably

be overlooked.

The evidence in support of the legitimate reasons for the actions involving Ms. Marshall consists of extensive detailed and highly specific contemporaneous documentation from multiple witnesses; consistent and credible testimony from multiple witnesses all corroborating one another, including one key witness who no longer works for CMC; and various grudging acknowledgements and admissions from Ms. Marshall, and in a couple of instances from other witnesses called by the General Counsel.

That evidence stands in contrast with self-serving testimony by Ms. Marshall whose demeanor as a witness demonstrated a general lack of credibility, particularly when challenged on cross examination; whose testimony was inconsistent and contradictory in several respects; who has a demonstrated history of making unfounded accusations against one of her former CMC managers in the context of an unmeritorious legal proceeding against him for alleged sexual harassment; as well as the general absence of any corroborating testimony from any other witnesses; and the absence of any contemporaneous documentation supporting her version of events.

For all of these reasons, CMC respectfully submits that the overwhelming weight of the evidence supports the legitimate reasons for each decision concerning Ms. Marshall's employment, and that the Section 8(a)(3) allegations involving her must therefore be dismissed.

Ms. Marshall has acknowledged and admitted that one of the responsibilities of Team Leaders and Charge Nurses at CMC is to make calls to off-duty nurses to ask if they are willing to come in to help meet patient needs by filling holes in the schedule

and/or because of changes in patient census or patient acuity. (Tr. 309).[6] However, her testimony relating this point was very revealing. When first asked on direct examination by Counsel for the General Counsel who is responsible for filling holes in the schedule, Ms. Marshall provided a seemingly rehearsed response incorporating deliberate vagueness, that "Ultimately it's the director, but we all try to help." (Tr. 154-55). Later when asked how often she personally has tried to fill holes in the schedule when in her role as Charge Nurse, she responded multiple times a week.[7] She went on to testify that normally "we" look at the next shift coming on and try to fill those holes first, and that "we would text people and call people". When Your Honor interjected by asking Ms. Marshall who the "we" was that she was referring to, she responded by acknowledging that it just meant the Charge Nurse or Team Leader for that shift. (Tr. 155-56).

The reason all of this is significant is that a consistent theme of Anne Marshall's – both in her testimony in response to questioning by Counsel for the General Counsel, and at the time of the underlying events when she was confronted by her managers about her behavior in her role as Charge Nurse – was that the lack of a written job description for Charge Nurses left her unclear as to what her responsibilities consisted of; that she was unclear and confused about what her supervisor's expectations were regarding the role of Charge Nurses, particularly when it came to making calls to try to secure more staffing; that the expectations seemed to change over the course of 2015 when a series of relatively short-term Interim Directors managed the ICU; and that securing additional staff was really not her problem, but instead was her supervisor's

[6] Every nursing unit has either a Charge Nurse or a Team Leader on every shift. Charge Nurses are permanently designated as having charge responsibilities. Team Leaders are regular staff nurses who temporarily assume charge responsibilities in the absence of a Charge Nurse.

[7] Ms. Marshall's regular work schedule consisted of three 12-hour shifts per week. (Tr. 155).

problem. In reality, however, a key responsibility and consistent expectation for the role of Charge Nurses at all times has been to call off-duty nurses to try to secure more staffing on an as-needed basis and as directed by the Director / Interim Director of the ICU, and that this occurred on almost a daily basis.[8]

The detailed events leading up to the June 26 suspension are fully described in the contemporaneous documentation consisting of R-Exs. 1(a) thorough (m), R-Ex. 2, and R-Exs. 6 through 12, as well as ALJ Ex. 1. These events and the evidence gathered and relied upon in the resulting investigation were also described in the testimony primarily by Respondent witnesses Norman Joel Brown, Florence Ogundele, and Linda Crumb. In summary, after some problems with Ms. Marshall's behavior beginning on June 25, on June 26th, the ICU where Ms. Marshall was working as Charge Nurse was experiencing a staffing crisis. The situation was emergent because a very critical patient needed to go from surgery to the ICU, and the patient was at risk for being transferred out to a different hospital unless additional ICU nurses could come in. Interim ICU Director Joel Brown conferred with the House Supervisor Flo Ogundele about the situation and both of them discussed the situation with Ms. Marshall in her capacity as Charge Nurse. Mr. Brown asked Ms. Marshall to start making calls to see if any nurses would come in. Ms. Marshall responded by stating that had already made the calls and no one was willing to come in. Mr. Brown then went to his office to start making calls, and the first nurse he called agreed to come in immediately. Mr. Brown then went to Ms. Marshall and asked her for a list of the nurses she had called so he

[8] We also note that another witness for the General Counsel, Christine Monacelli, is an ICU Staff Nurse who acknowledged on cross examination that it was the role of a Charge Nurse and/or Team Leader to make calls to get nurses to come in to fill holes in the schedule or because of a change in census or patient acuity. (Tr. 456-57). Ms. Monacelli also confirmed that Anne Marshall had called her at home for that purpose while serving in the capacity of Charge Nurse on multiple occasions. (Tr. 448).

would not be duplicating her efforts by calling anyone twice. Ms. Marshall then stated to both Mr. Brown and Ms. Ogundele that there was no list because she really hadn't made any calls. Thus, Ms. Marshall lied the first time when she said she had already made calls and no one would come in, and she exhibited a lack of cooperation by effectively refusing to assist with an emergent situation that could have placed a patient in jeopardy. As a result, Ms. Marshall was suspended for the remainder of that shift and the next shift. This had everything to do with her misconduct and nothing to do with her Union activity.

Shortly thereafter on July 3rd, Ms. Marshall engaged in an aggressive and confrontational dialog with her immediate supervisor, Mr. Brown, about getting Ward Clerk help. Ms. Marshall proceeded to angrily follow Mr. Brown around violating his personal space and blocking his movements, and within a few minutes thereafter she confronted him by again and remained standing in the doorway to his office demanding his attention despite repeatedly being asked by Mr. Brown to leave until finally he had to threaten to call security. Ms. Marshall received the July 10 documented verbal warning for this unacceptable behavior. Once again, the verbal warning had everything to do with her misconduct and nothing to do with her union support.

In yet another series of incidents on August 28th, Ms. Marshall exhibited extremely rude and disrespectful behavior upon first meeting her new immediate supervisor, the brand new Interim Director of the ICU, Sandra Beasley, by flipping her middle finger at her. That same morning, Ms. Beasely made a point of telling Ms. Marshall that she wanted to go with her to the morning bed meeting so Ms. Beasley could become more familiar CMC operations. When the time came for the bed meeting, Ms. Marshall left the unit and went to the meeting on her own without finding Ms.

Beasely so they could go together. When Ms. Beasely expressed to Ms. Marshall that she was upset by her lack of consideration, Ms. Marshall responded by saying "you're not a baby, and I don't have to take you by the hand and lead you around." Later that same day, Ms. Beasely asked Ms. Marshall who was Team Leader to make calls to secure additional staffing for the weekend. Ms. Marshall responded by saying no one is going to come in because we're all tired and overworked. Ms. Beasely told her that she still needed to make the calls. Ms. Marshall proceeded to argue about it stating that she didn't know the expectation because she did not have a job description, and ultimately Ms. Marshall told another employee to bring the schedule with holes in it to Ms. Beasely instead of trying to work on filling the holes herself. All of this occurred on the very first day that Ms. Marshall met the new Interim Director of the ICU. As a result of her unacceptable behavior, Ms. Marshall was demoted from the Team Leader and Charge Nurse role and returned to a regular staff nurse role. Once again this decision had everything to do with her misconduct and nothing to do with her union support.

The nature and extent of Ms. Marshall's behavior resulting in her suspension, verbal warning and eventual demotion were somewhat unprecedented, but CMC was able to find at least five other similarly-situated employees who were similarly disciplined for engaging in roughly comparable violations for failing to uphold professional standards/Code of Conduct. (R. Ex. 14). This evidence includes a written warning for a lost temper and foul language; a 3-day suspension for violating the employee conduct policy; a final written warning for explosive and aggressive profanity and a suspension for exhibiting threatening behavior toward peers and criticizing co-workers; and a verbal warning for a heated argument. (R. Ex. 14). These examples demonstrate that certain standards of performance and behavior have been expected

and shortfalls have been addressed through formal disciplinary action over a period of many years and long before the current Union organizing campaign.

With respect to Ms. Marshall's 2015 performance evaluation, normally Department Directors perform the annual performance evaluations for the staff nurses, but in 2015 Assistant Vice President of Patient Services Linda Crumb performed the performance evaluations for the ICU staff nurses because the longstanding former director had left and the interim directors who followed lacked sufficient time upon which to base an evaluation. Thus, Crumb advised the ICU nurses in a staff meeting that for 2015 they would start with the same rating as they had in 2014, then she would review the personal accountability section of the evaluation and set goals for next year. (Tr. 98-100, 932).

The personal accountability section includes licensure, mandatory attendance and work behaviors, among others. (Tr. 933, GC Ex. 29(h) and (g)). For the personal accountability section in 2015, Ms. Marshall lost 1.0 points for demonstrating unacceptable behavior. This loss was based on her dishonesty regarding call-ins on two separate occasions and her dishonesty during the evaluation period. (Tr. 938). This loss of 1.0 point had absolutely nothing to do with her Union support and everything to do with her failure to provide truthful information regarding staffing primarily during the events leading up to her suspension. (Tr. 938). This resulted in her lower evaluation for 2015. (Tr. 938-39). Contrary to Counsel for the General Counsel's assertion that Ms. Marshall was the only ICU Nurse whose 2015 performance evaluation was not identical to her 2014 performance evaluation, Ms. Crumb's uncontroverted testimony was that several nurses her lost 1.0 point from their 2014 to their 2015 overall evaluation score for various reasons. (Tr. 938).

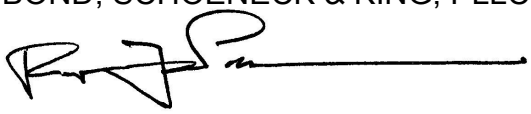
IV. CONCLUSION

For the reasons stated above, Cayuga Medical Center respectfully requests that the Amended Complaint be dismissed in its entirety.

Dated: July 12, 2016

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC



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